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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 803

STEUART PURCELL, EDMUND BUDNITZ AND ARTHUR H. BRICE, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND, AND McCULLOUGH COAL CORPORATION, A MARYLAND CORPORATION,
Appellants,

v.

THE UNITED STATES OF AMERICA, THE CONFLUENCE & OAKLAND RAILROAD COMPANY AND THE BALTIMORE & OHIO RAILROAD COMPANY,
Appellees.

BRIEF OF APPELLANTS.

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BRIEF OF APPELLANTS.

OPINIONS BELOW.

The opinion of the District Court of the United States for the District of Maryland is reported in 41 F. Supp., 309. The report of the Interstate Commerce Commission, sitting as a full commission, is reported at 247 I. C. C. Rep., 399. The report of Division 4 of the Interstate Commerce Commission is reported at 244 I. C. C. Rep., 451.

JURISDICTIONAL STATEMENT.

The Appellants herein invoke the jurisdiction of this Court to review an order of the United States Court for the District of Maryland (hereinafter referred to as the "District Court") in a civil case in equity, sitting as a three judge statutory court pursuant to Sections 207, 210 and 238 (4) of the Judicial Code, as amended (28 U. S. C. A. 41 (28), 47a, and 345 (4); Section 1 (20) of Part 1 of the Interstate Commerce Act, as amended 49 Stat., 543 (49 U. S. C. A. 1 (20)). The District Court reviewed an action instituted by the Appellants herein to enjoin the operation and effect of an order of the Interstate Commerce Commission (hereinafter referred to as "the Commission") authorizing the abandonment of a line of railroad from Confluence and Oakland Junction, Pennsylvania, to Kendall, Maryland.

The District Court assumed jurisdiction of the cause and on October 13, 1941 filed an opinion and entered an order dismissing the bill of complaint filed by the Appellants. The express statutory right to a review of the aforesaid order by this Court is conferred by Section 238 of the Judicial Code (28 U. S. C. A. 345).

HISTORY OF THE CASE.

The Confluence and Oakland Railroad Company and the Baltimore and Ohio Railroad Company as owner and operator, respectively, (hereinafter sometimes jointly referred to as "Carrier") filed on January 15, 1940 with the Commission a joint application (R. p. 21) under Section 1 (18) of Part 1 of the Interstate Commerce Act for a certificate that the present and future public convenience and necessity justify the abandonment and removal of the aforementioned entire line of railroad extending from Confluence and Oakland Junction, Pennsylvania, to Kendall, Maryland, a distance of approximately 19.79 miles. According

to the application, the Confluence and Oakland Railroad Company is the owner of the railroad line in question and the Baltimore and Ohio Railroad Company, as the owner of all of the outstanding shares of stock and bonds of the former company, has agreed to operate the property for its own account and pay all the expenses of such operation, without accounting to the Confluence and Oakland Railroad Company for the result of the operations.

The sole reason assigned for the proposed abandonment, as stated in the application and in the return to the questionnaire (see pp. 6, 28, 29 of Plaintiffs' Exh. A) is that the War Department of the United States Government proposes to construct a flood control dam on the Youghiogheny River above Confluence, Pennsylvania, which will cause the inundation of a part of the line with the result that the line will become a detached segment. It is further stated in the application and answers to the questionnaire that the Carrier is seeking authority to abandon the line "at the behest of the United States Government" and that an option has been given by the Carrier to the United States of America to purchase the line for the sum of $306,000, subject, however, "to the approval and authorization of the abandonment of the Confluence and Oakland branch by the Interstate Commerce Commission." It is further stated by the Carrier in its application that the line has annually, over a period of years, produced a net profit to the Baltimore and Ohio Railroad.

Hearings on the application were held at Cumberland, Maryland, and Washington, D. C., before duly authorized examiners of the Commission, at which the Public Service Commission of Maryland and the McCullough Coal Corporation, appellants herein, appeared in opposition to the granting thereof. Other protestants at such hearings included a number of shippers and other representatives of

the community of Friendsville and the contiguous territory affected by the proposed abandonment.

A report was filed by Examiner A. G. Nye on November 5, 1940 (R. p. 11) recommending that the application be denied and finding therein that the present and future public convenience and necessity did not permit of such abandonment.

Exceptions to the Examiner's report were thereafter filed in behalf of the War Department and the Carrier and on March 6, 1941, Division 4 of the Commission filed its report approving the proposed abandonment (R. p. 20).

Thereafter, on the petition of the Appellants, the Commission sat as a whole for the purpose of hearing reargument and on July 31, 1941 filed its Report (hereinafter referred to as "the Report of the Commission") affirming the report and order of Division 4 (R. p. 31). A dissenting opinion was filed by Chairman East. an in which Commissioners Rogers and Patterson concurred (R. p. 35).

The Commission on September 2, 1941 issued its order or certificate authorizing the abandonment in question and the Appellants shortly thereafter filed their Bill of Complaint (R. p. 1). A three-judge-court was convened for the purpose of reviewing the Report of the Commission and its said order or certificate authorizing the proposed abandonment.

The District Court on October 13, 1941 filed an opinion (R. p. 43) and entered its order dismissing the bill of complaint filed by the Appellants. A petition for appeal and stay order pending appeal was filed with the lower court on November 5, 1941. On the same day the lower court allowed the appeal and further ordered that, no objection

being interposed by the Appellees, upon the Appellants filing a proper bond, the Appellees be restrained and enjoined from abandoning the operation of the line or railroad running and extending from Confluence and Oakland Junction, Pennsylvania, to Kendall, Maryland, pending a determination of the said appeal by this Court.*

Thereafter, on January 5, 1942, this Court noted probable jurisdiction of the case.

STATEMENT OF FACTS.

The testimony and evidence before the Commission is contained in the following documents (all of which have been filed with the Clerk of this Court as "Plaintiffs' Exhibit A") certified by the Secretary of the Interstate Commerce Commission, viz:

(1) Application of the Carrier filed on January 15, 1940.

(2) The Carrier's return to questionnaire filed on February 15, 1940.

(3) The Carrier's corrected return to questionnaire filed on March 30, 1940.

(4) Transcript of stenographer's notes of hearing held on April 11, 1940 at Cumberland, Maryland, before Examiner Nye and Exhibits 1 to 12, inclusive, filed at said hearing.

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* On December 24, 1941 the Government filed a petition in the United States Court for the Western District of Pennsylvania to condemn that portion of the aforesaid line of railroad lying in Pennsylvania and seeking possession of the same. On December 30, 1941 the Government filed a similar petition in the United States Court for the District of Maryland for the condemnation of that portion of the said line of railroad lying in Maryland and seeking possession of the same. Hearings were held in both proceedings on motions for possession. On January 24, 1942 the United States Court for the District of Maryland denied the motion of the Government for immediate possession holding that, in view of the representations made by the Government at the time of the hearing before the Statutory Court in these proceedings and in view of the pendency of this appeal and the stay order pending final determination by this Court, justice required that the status quo of the case be maintained. The United States Court for the Western District of Pennsylvania has, as yet, entered no order on the motion for possession.

(5) Transcript of stenographer's notes of hearing held on June 12, 1940 at Washington, D. C. before Examiner Molster and Exhibits 13 to 19, inclusive, filed at said hearing.

(5½) One highway map (uncertified).

(6) Petition of Plaintiffs for rehearing filed on April 10, 1941.

(7) Reply of United States of America to petition for rehearing, filed on April 18, 1941.

(8) Report and certificate of the Commission filed and entered on March 6, 1941.

(9) Order of Commission entered on June 2, 1941 in Finance Docket No. 12742, The Confluence and Oakland Railroad Company et al, abandonment.

It has been stipulated by counsel that the above documents may be omitted in printing the record before this Court (R. p. 60).

Counsel for the parties hereto have also agreed that the findings of fact as found in the report of Division 4 of the Commission (R. p. 20) represent a fair condensation of the facts presented to the Commission in the proceeding and upon which the report of the Commission and its certificate of abandonment were based. The findings are as follows:

> "The Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company, lessee, jointly applied on January 15, 1940, for permission to the former to abandon, and to the latter to abandon operation of, a line of railroad extending from valuation station O minus 13 at Confluence & Oakland Junction, Pa., south to Kendall, Md., approximately 19.79 miles, all in Somerset and Fayette Counties, Pa., and Garrett County, Md. The application is opposed by the Public Service Commission

of Maryland. Protests were filed by local interests, and a hearing has been held. All points mentioned herein are in Maryland unless otherwise stated.

The Confluence & Oakland was formed in 1890 by a consolidation and merger of the Confluence & State Line Railroad and the State Line & Oakland Railway. During the same year the entire property was leased for 999 years to the Baltimore & Ohio, the owner of all the outstanding capital stock.

The line operates through a semimountainous section of southwestern Pennsylvania and western Maryland, following generally the Youghiogheny River as far as Kendall. There are numerous curves ranging from 6° to 17°, with prevailing grades of 0.8 percent northbound and 1.36 percent southbound. The track is laid with 60-pound and 67-pound rail, except for about 2.74 miles of 85-pound and larger. No deferred maintenance or need for extraordinary expenditures has been shown. The Confluence & Oakland owns no equipment. As of December 31, 1936, the original cost to date of the property, exclusive of land and assessments for public improvements, was $398,873. As of the same date the cost of reproduction less depreciation and the value of about 124 acres of land and rights in private land were reported by our Bureau of Valuation to have been $350,074 and $8,717, respectively. The applicants report the net salvage value of the recoverable property to be $25,965.

During the past five years train service has consisted of a mixed train in each direction on Tuesdays and Saturdays, operating from Rockwood, a point on the main line about 10 miles east of Confluence & Oakland Junction, where the line connects with the main line of the Baltimore & Ohio. The stations along the line, none of which is served by any other railroad, the population at each, and the approximate distance in miles from the junction are: Charlestown, Pa., 50, 1; Flanigan, 10, 6; Tub Run, 20, 8; Somerfield, 250, 8; Reason Run, 10, 11; Watson, 25, 12; Geices, Md., 10, 13;

Buffalo Run, 10, 14; Selbyport, 100, 15; Friendsville, 600, 17; Kendall, 10, 18. Somerfield and Friendsville are the only agency stations. The total population embraced within an area of 0.5 mile on both sides of the line is estimated to be 2,000. Farming is carried on to a limited extent, while lumbering, which flourished at one time, has largely disappeared because of the depletion of standing timber. All coal mines formerly along the line have closed down and been abandoned except one, which is located between Friendsville and Kendall. This is the only industry of any importance.

U. S. Highway 40 and a paved State highway cross the line at Somerfield and Friendsville, respectively. Improved State highways also parallel it at a substantial distance on each side. Secondary roads traverse the area and afford connections with these highways. No common-carrier bus or truck service operates in the immediate territory except at Friendsville, which is served by a truck line operating from Cumberland. Deliveries are made to all points, however, by local and private trucks operating mainly out of Confluence and Somerfield.

The traffic handled over the line during the years 1934-39, in order, was as follows: Local passengers, 340, 239, 320, 566, 367, 430; interline passengers, 22, 8, 11, 4, 16, 8; carloads of freight handled between stations on the line and off-line points, inbound, 502, 195, 222, 201, 196, 134; outbound, 91, 285, 613, 525, 327, 735; less-than-carload, inbound, 227, 326, 383, 381, 321, 249 tons; outbound, 170, 21, 11, 27, 16, 32 tons. No local or bridge freight traffic was handled. During 1934 about 343 carloads of contractors' equipment, supplies, and road-building material were handled over the line. Since then the volume of such traffic, presumably used for maintenance purposes, has fluctuated from 49 carloads received in 1935 to 94 in 1938 and 36 in 1939. An average of 51 carloads of farm products, animals, and fertilizer were received and less than 2 carloads

shipped yearly. Inbound coal traffic average 5 cars a year, while outbound shipments each year, 1934-39, in order, were 23, 230, 531, 451, 311, and 725 carloads. Incoming gasoline and oil shipments declined steadily from 98 carloads in 1934 to 30 in 1939, while shipments of forest products declined from 55 to 9 carloads.

The results of line operation during the years 1935-39, in order, as shown by the applicant's income statements, were as follows: Revenues, local and assigned portions of interline, passenger, $87, $52, $64, $70, $63, $67; milk and miscellaneous, $114, $107, $101, $106, $93, $72; freight, inbound, $5,221, $2,297, $2,717, $2,054, $2,634, $1,215; outbound, $637, $2,252, $4,449, $3,690, $2,277, $5,729; system revenues from line traffic, including also minor amounts received by the Alton Railroad and the Staten Island Rapid Transit Railway, passenger, milk, and miscellaneous, $380, $298, $279, $262, $390, $395; freight originating on line, $6,240, $20,589, $38,887, $30,561, $20,411, $54,065; destined to points on the line, $29,196, $14,201, $15,887, $15,373, $14,768, $11,078; totals, $41,875, $39,796, $62,384, $52,116, $40,636, $72,621. Operating expenses, exclusive of overhead charges, were maintenance of way and structures, $6,045, $3,797, $6,226, $9,069, $5,767, $5,738; maintenance of equipment, $1,727, $1,946, $2,242, $2,135, $1,757, $1,965; transportation, $6,308, $6,876, $6,924, $7,067, $7,376, $7,444; railway tax accruals, $1,012, $998, $1,116, $1,729, $1,540, $1,627, totals, $15,092, $13,617, $16,508, $20,000, $16,440, $16,774; cost of handling line traffic over other parts of the system, using composite operating ratios, exclusive of taxes, ranging from 73.14 percent to 77.93 percent, and based upon the volume of line traffic handled over the Baltimore & Ohio and subsidiaries, the Alton Railroad, and the Staten Island Rapid Transit Railway, but influenced mainly by the farmer, $26,250, $26,084, $40,267, $35,132, $27,719, $48,799; losses as an independent line operation, $9,033, $8,910, $9,176, $14,080, $11,372, $9,690; system profits from line traffic, $9,567, $9,004, $14,788, $11,064, $7,850, $16,738, which, offsetting the line deficits shown above,

result in profits of $533, $95, $5,612, $3,016 (loss) $3,523 (loss), and $7,048. Local freight, passenger, milk, and miscellaneous revenues are actual, while a portion of the interline revenue was allocated to the line on a mileage prorate. Expenses of maintenance of way and structure are actual, except where an apportionment was made because of overlapping maintenance sections. Maintenance of equipment was divided on System car-mile or locomotive-mile bases. Transportation expense includes the actual cost of operating stations on the line, and trainmen's wages and part of the equipment operating costs were divided according to locomotive-miles and car-miles operated in the different kinds of service. Tax accruals are mainly those assessed against tangible property, but also include gross-receipts, capital-stock, franchise, and special taxes apportioned on a car-mile basis. Assuming that the system cost of handling traffic originating on or destined to points on the line amounted to 50 percent of the revenues therefrom, the system profits from such traffic during each of the periods referred to would have been $17,908, $17,544, $27,527, $23,098, $17,764, and $32,769, which, when offset by losses directly attributed to line operations, would result in net system profits of $8,875, $8,634, $18,351, $9,018, $6,412, and $23,079. Using a 25-percent operating factor claimed by the protestants to be more representative of the actual cost of handling line traffic over other parts of the system, the profit to the system for the same periods would have been $17,830, $17,406, $32,115, $20,567, $15,304, and $39,463.

Pursuant to the provisions of an act of Congress of June 28, 1938 (52 Stat. 1215), the War Department has selected a point on the line about 1 mile from Confluence, for the site of a dam across the Youghiogheny River. This unit is one of six that are scheduled for construction, are under construction, or have been completed. Funds for the project have been appropriated by Congress, and also allotted by the Secretary of War to carry on the work, which was to begin

in April 1940 and continue for about 3 years. When at full elevation the reservoir thus created will inundate approximately 12 miles of the line from the dam site to a point upstream near Friendsville, leaving available for operation only the 1-mile section below the dam, which is to remain in service so long as it shall be required by the War Department for the delivery and removal of material and equipment used in the construction work. In the absence of any connection with the applicants' main line or any other railroad, the detached 6-mile segment from the high-water mark south to the end of the line will be rendered inoperative. *Plans provide for the relocation of all townsites, highways, and other public facilities that will be inundated.* In accordance with the powers granted under the act, including the right to acquire land directly involved by condemnation if necessary, which according to the evidence will be done if the application herein is not approved, the War Department has elected to exercise its option for the purchase of the affected part of the line for $306,000, subject to the approval of the application herein. This option agreement provides that the applicants shall remove all rails, ties, and movable property from the affected area within 90 days after abandonment or forfeit their right thereto.

The applicants and the War Department have submitted four estimates showing that the cost of relocating the line would range from $2,018,000 to $2,519,000, or about $100,000 a mile. These estimates are in considerable detail and show specific routes and definite quantities and unit prices for the different kinds of construction involved. The principal protestant contends that these estimates are exorbitant because of the high unit prices used for land and material, and contemplate a type of construction not warranted by the amount of traffic handled or by the construction standards prevailing on the present line. An engineering witness for the protestant testified that a relocated line sufficient to carry the present traffic could

be constructed for about $800,000 or possibly less. The applicants and the War Department assert that there is no economic justification for relocating the line at such a high cost to the taxpayers in the light of the present condition of business and the uncertainty of potential traffic, while the protestants contend that, under the law, the War Department must relocate the line regardless of cost. We are not convinced of the accuracy of any of these estimates. It was also shown by the applicants that a new line built according to any of the estimates would require not only normal maintenance expenditures totaling about $8,000 annually in excess of the cost to maintain the present road, but would also necessitate an additional expense of about $8,000 a year over a period of 5 years while the line is undergoing seasoning. The protestants' estimated maintenance expenditures for the line would be even higher.

The McCullough Coal Corporation, hereinafter referred to as the coal company, owner of bituminous-coal lands and rights, whose mine opening and loading facilities adjoin the right-of-way beyond the flooded area, protests the proposal because it would be deprived of direct rail connections. The record shows that practically the company's entire production is shipped by rail to nearby eastern points. In case the line is abandoned it would be necessary to use motor trucks between the mine and the nearest railhead at Grantsville, at a cost of about $1.12 a ton. *Under such circumstances, the mine would be forced to close down because of inability to compete with other mines more favorably located.* Trucks are used now for local deliveries only. Coal shipments averaged 27,211 tons annually during the 1921-33 period and 22,386 tons during 1934-39. This latter average is about 994 tons a year more than the outbound shipments reported by the applicants. Shipments have fluctuated each year since 1933, when a serious fire curtailed production. Shipments averaged about 9,086 tons annually during the period 1933-35, 27,728 tons in 1936-37. In 1938 the

volume handled was 17,632 tons, and in 1939, 40,243 tons. The large increase in the 1939 tonnage is claimed by the applicants to result from a suspension of operations in the unionized bituminous-coal fields during April and May of that year.

The coal company contends that, in view of the kind of service furnished by the line and the volume of traffic handled, it was erroneous for the applicants to use a system composite operating ratio to determine the cost of handling line traffic over other parts of the system, and also contends that 25 percent would be fair and reasonable. On the latter basis, system profits from line operations for the 1934-39 period would average about $23,781 yearly. Through the use of a 50-percent factor, frequently used in cases of this character, profits would average about $12,395 annually. The returns filed by the applicants show an average annual profit of $1,125." (Italics ours.)

SPECIFICATION OF ERRORS.

Appellants contend that the District Court erred in:

(1) Failing to find that there was no substantial evidence to support the order of the Commission granting the application of the Carrier to abandon the line of railroad running between Confluence & Oakland Junction, Pennsylvania, and Kendall, Maryland.

(2) Failing to find that there was no substantial evidence that the public convenience and necessity would be served by the abandonment of the aforesaid line of railroad.

(3) Failing to hold that the Commission was without statutory authority to enter the aforesaid order upon the application and evidence before it.

(4) Holding that the Commission had found that the interest of the transportation public would be served by the abandonment of the aforesaid line.

(5) Holding that the Commission properly considered the question of relocation of the aforesaid line.

(6) Failing to grant a temporary and permanent injunction restraining enforcement of the aforesaid order of the Commission.

SUMMARY OF ARGUMENT.

I.

The Commission was without statutory authority to grant the application of the Carrier.

A.

The Commission was without jurisdiction to permit an abandonment upon the grounds stated in the application.

The application and return to the questionnaire disclosed on their face that the sole reason for the abandonment was the flood control project. The application should have been denied forthwith because of lack of jurisdiction by the Commission to order an abandonment on such ground.

B.

The order of the Commission is not based upon substantial evidence.

(i) The evidence conclusively shows that the railroad is rendering a necessary service. The abandonment of the service would concededly destroy the business of the Appellant, McCullough Coal Corporation and would irreparably injure, if not destroy, the business of numerous other shippers dependent upon the line.

(ii) The evidence is uncontradicted that the railroad has been and is now operated at a profit. The only dispute is as to the *amount* of the profit.

(iii) The evidence as to the purported superior public benefit involved in the flood control project was not properly before the Commission. The measure to be applied is the public interest *as the same relates to transportation.*

II.

The Commission's findings with respect to the question of relocation were contrary to law.

A.

The Commission was in error in holding that the Carrier would be entitled to earn a return upon the investment in the cost of relocation, regardless of the source of the funds with which such cost of relocation would be defrayed.

If such cost is to be borne by the Secretary of War as a part of the cost of the flood control project, resulting from the inundation of a necessary railroad, the cost thereof would be donated capital and hence not an investment of the Carrier upon which it would be entitled to earn a return.

B.

The Commission was in error in holding that the Carrier would be entitled to earn a return upon an investment by it in the cost of relocation.

If such cost is to be borne by the Carrier, it would be entitled to earn a sum sufficient to defray the expense of operating and maintaining the relocated branch line and, as a matter of law, should be required to continue such operation in the absence of any evidence that such continuance thereof would constitute a burden upon the system. The evidence is conclusive

that the Carrier's revenues are sufficient to defray such expense of operation and maintenance and that its business will continue to produce revenues sufficient to meet such expense.

ARGUMENT.

I.

The Commission Was Without Statutory Authority To Grant The Application of The Carrier.

The test to be applied in abandonment cases under Section 1 (18), of the Interstate Commerce Act is whether a line of railroad should or should not be abandoned from the standpoint of the public interest as the same relates to transportation. The Commission has no jurisdiction under the statute to apply extraneous measures, such as the general public welfare involved in a flood control project.

The Appellants contend that it has been uniformly held by this Court that the yardstick by which the Commission must measure applications seeking abandonment is the determination of whether such abandonment is required for the promotion of interstate commerce or the protection thereof from an undue burden. It is the public interest which must be considered and the "public interest" relates solely to that of the transportation public. The fact that what might be regarded as a superior public interest (such as the interest of those who will be served by the construction of a flood control project) will be promoted, is a matter with which the Commission cannot lawfully concern itself. Its function and duty, in relation to applications of carriers of the character here being considered, is to pass upon such applications exclusively in the light of the effect of the granting or denying of the authority

prayed will have upon the welfare of the transportation public concerned.

The inescapable conclusion that the "public welfare" with which the Commission is concerned is confined to the transportation public, is manifest from the language of the Interstate Commerce Act, as uniformly construed by the decisions of this Court. Those decisions deal not only with the general purposes of the Act but with the specific powers of the Commission (such as to permit abandonments in proper cases) and establish the criteria by which those powers delegated to the Commission must be exercised.

As heretofore stated, the application in the instant case was filed pursuant to Section 1 (18), of Part 1 of the Interstate Commerce Act (as amended by the Transportation Act of 1920), which reads as follows:

> "No carrier by railroad * * * shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Section 1 (20), provides:

> "The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. * * *"

In Sharfman's treatise entitled, *"The Interstate Commerce Commission"*, (Volume II, at page 264) commenting

upon the Commission's power over abandonment as vested by the above sections, it is said:

> "The Commission's power over abandonments, as conferred by statute, is in its general terms co-extensive with that over new construction. The continued operation of existing lines may prove as burdensome to interstate carriers as the further extension of such lines, or undue competitive building by other carriers;—hence discontinuance of service was made dependent upon the Commission's authorization, through the issuance of certificates of public convenience and necessity. *Since this authority was conferred in the interest of fostering and protecting the transportation system as a whole* * * *". (Italics ours.)

It is clear that the purpose of the Transportation Act of 1920, particularly the paragraph in question, is to protect *interstate commerce* from undue burdens and has no relation to *collateral* matters of alleged interest to the public. In the case of *Colorado v. United States*, 271 U. S. 153, 162, Mr. Justice Brandeis in referring to the paragraphs in question, said:

> "Transportation Act 1920 did not purport to take from the state its powers to control intrastate commerce. * * * The argument rests upon a misconception of the nature of the power exercised by the Commission in authorizing abandonment under paragraphs 18-20. The certificate issues, not primarily to protect the railroad, *but to protect interstate commerce* from undue burdens or discriminations. The Commission by its order removes an obstruction which would otherwise prevent the railroad from performing its Federal duty. * * * *The sole objective of paragraphs 18-20 is the regulation of interstate commerce.*" (Italics ours.)

In *New York Central Securities Corp. v. United States*, 287 U. S. 12, 24, Chief Justice Hughes in construing the

powers vested in the Commission under the Transportation Act, said:

> "Appellant insists that the delegation of authority to the Commission is invalid because the stated criterion is uncertain. That criterion is the 'public interest'. *It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations.* The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary. Going forward from a policy mainly directed to the prevention of abuses * * * Transportation Act, 1920, was designed better to assure adequacy in transportation service. This Court in *New England Divisions Case (Akron, etc. v. United States)* 261 U. S. 184, 189, adverted to that purpose, which was found to be expressed in unequivocal language; 'to attain it, new rights, new obligations, new machinery, were created.' The Court directed attention to various provisions having this effect, and to the criteria which the statute had established in referring to 'the transportation needs of the public', 'the necessity of enlarging transportation facilities', and the measures which would 'best promote the service in the interest of the public and the commerce of the people.' * * *. The provisions now before us were among the additions made by Transportation Act, 1920, *and the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities,* questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred. So far as constitutional delegation of authority is concerned, the question is not essentially different from that which is raised by provisions with respect to reasonableness of rates, to discrimination, and to the issue of certificates of public convenience and necessity." (Italics ours.)

In *Texas v. United States*, 292 U. S. 522, 531, Chief Justice Hughes again said:

> "The criterion to be applied by the Commission in the exercise of its authority * * * is that of the controlling public interest. And that term as used in the statute *is not a mere general reference to public welfare*, but, as shown by the context and purpose of the Act, 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and the best use of transportation facilities.' (Citing *New York Central Securities Corp. v. United States*, supra.) (Italics ours.)
>
> "It is in the light of this criterion that we must consider the scope of the Commission's authority * * *."

In *Schechter v. United States*, 295 U. S. 495, 539, the Chief Justice repeated:

> "By the Interstate Commerce Act, Congress has itself provided a code of laws regulating the activities of the common carriers subject to the act, in order to assure the performance of their services upon just and reasonable terms, with adequate facilities and without unjust discrimination. Congress from time to time has elaborated its requirements, as needs have been disclosed. To facilitate the application of the standards prescribed by the Act, Congress has provided an expert body. That administrative agency, in dealing with particular cases, is required to act upon notice and hearing, and its orders must be supported by findings of fact which in turn are sustained by evidence. *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88 * * * *Florida v. United States*, 282 U. S. 194 * * *. When the Commission is authorized to issue for the construction, extension or abandonment of lines, a certificate of 'public convenience and necessity', or to permit the acquisition by one carrier of the control of another, if that is found to be 'in the public interest', we have pointed out that these provi-

sions are not left without standards to guide determination. The authority conferred has direct relation to the standards prescribed for the service of common carriers and *can be exercised only upon findings, based upon evidence, with respect to particular conditions of transportation. New York Cent. Securities Corp. v. United States*, 287 U. S. 12, 24, * * * *Chesapeake & O. R. Co. v. United States*, 283 U. S. 35." (Italics ours.)

In *Texas v. Eastern Texas R. Co.*, 258 U. S. 204, 217, Mr. Justice Van Devanter refers to paragraphs 18, 19 and 20 of the Transportation Act in the following language:

"Being amendments of the Interstate Commerce Act, they are to be read in connection with it and with other amendments of it. *As a whole, these acts show that what is intended is to regulate interstate and foreign commerce,* and to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of the other class. They contain many manifestations of a continuing purpose to refrain from any regulation of intrastate commerce, save such as is involved in the rightful exertion of the power of Congress over interstate and foreign commerce. * * * And had there been a purpose here to depart from the accustomed path, and to deal with intrastate commerce as such, independently of any effect on interstate and foreign commerce, it is but reasonable to believe that that purpose would have been very plainly declared. This was not done." (Italics ours.)

In *Akron, etc., v. United States*, 261 U. S. 184, 189, Mr. Justice Brandeis said:

"Transportation Act, 1920, introduced into the Federal legislation a new railroad policy. * * * Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act

sought to insure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language."

In the comparatively recent case of *United States v. Lowden*, 308 U. S. 225, 230, (decided December 4, 1939) involving an application in behalf of two or more carriers to merge, Mr. Justice Stone, speaking for the Court, said:

> "* * * *'public interest' in this section does not refer generally to matters of public concern apart from the public interest in the maintenance of an adequate rail transportation system;* that it is used in a more restricted sense defined by reference to the purposes of the Transportation Act of 1920, of which the section is a part and which, as had been recognized in earlier opinions of this Court, sought through the exercise of the new authority given to the Commission *to secure a more adequate and efficient transportation system.*" (Italics ours.)

The true significance, however, of the decision in the *Lowden* case results from the finding by the U. S. Supreme Court that the Commission, in passing upon applications of carriers seeking authority to consolidate, is empowered to prescribe as conditions to the approval thereof any reasonable conditions which tend to assure an adequate system of transportation in furtherance of interstate commerce. *The yardstick or measure for determining the public interest remains the interest of the transportation public.* It should be parenthetically observed that in the *Lowden* case no effort was made by the complainants to attack the sufficiency of the evidence upon which the Commission relied and indeed the record of the proceeding before the Commission was never offered in evidence in court. Mr. Justice Stone, in affirming the action of the Commission in attaching certain conditions to its order of approval relat-

ing to the treatment to be accorded the carrier's employees, said at page 231:

> "Appellees do not attack the sufficiency of the evidence on which the Commission's findings are based, and that evidence was not submitted to the district court for review. Hence we are free to disturb the findings only if we can say that there can be no rational basis for them."

In the case at bar, the Appellants assert that no substantial evidence can be gleaned from the Record that affords a lawful basis for the order of the Commission.

It thus appears from the above decisions that the jurisdiction of the Commission is strictly limited and that the "public interest" it may consider is only that of the public concerned with *transportation service* in interstate and foreign commerce, and does not include elements of public interest beyond those prescribed. Clearly the jurisdiction of the Commission does not include the power to consider the public interest involved in national flood control projects as a basis for issuing a certificate authorizing abandonment. To the contrary, it is manifest that the Commission must refuse such a certificate where, as here, the issuance thereof would operate to *deprive* the public of necessary transportation service conceded *not* to be a burden on interstate commerce.

Where it cannot be shown that (i) the service to be abandoned is a burden on interstate commerce or (ii) the convenience and necessity of *the transportation public* warrants the abandonment, the Commission is without power to grant such an abandonment, and hence a certificate issued under such circumstances is beyond the jurisdiction of the Commission.

Certificates authorizing abandonments have been issued by the Commission upon a wide variety of bases, and

numerous factors have been considered by the Commission as determinative of the existence of the requisite "public convenience and necessity".

These bases and factors are comprehensively summarized in Sharfman's *"The Interstate Commerce Commission"*, (Vol. III-A, pp. 331-348), as follows:

> "Broadly speaking, applications for abandonments are of two principal types: Those incidental to readjustments in plant and service; and those designed to relieve carriers of the burdens of unprofitable operation. The proceedings resulting from the first of these groups of applications can be disposed of very briefly. They are generally initiated for the purpose of increasing efficiency, effectuating economies, or promoting safety, and they contemplate no material diminution in the scope or quality of the service rendered to the patrons and communities involved. * * *
>
> "But in most instances carriers seek permission to abandon their lines, in whole or in part, because of the pressure of unprofitable operations; and the proposed abandonments generally evoke protest because of their probable transportation effects upon the communities being served by the existing facilities. * * *
>
> "The amount of the operating deficits, the duration of their incidence, the likelihood of their continuance, the causes of their emergence, and, where a branch is involved, the relationship which they bear to the operating results as a whole, are obviously considerations relevant to an appraisal of carrier claims; the presence or absence of any basic economic justification for the maintenance of the service, the extent to which financial support is actually accorded to it through traffic demand, the feasibility of suggested expedience for rendering it more remunerative, the probable social and industrial effects of its discontinuance, and the degree to which alternative or substitute services are available are obviously considerations relevant to an appraisal of community claims; and a final judgment as to whether public convenience and necessity permit

of the abandonment is the resultant of all such considerations, in their numerous interrelations, as they are developed in each proceeding." * * *

"While the interests of the general community, as influenced especially by the presence or absence of substitute services are uniformly held in view in connection with proposed abandonments, *the Commission is guided primarily by financial considerations.* When continued operation can result only in losses to the carrier, this very fact is deemed to be persuasive evidence that public convenience and necessity permit of the abandonment * * *. When * * * the proposed abandonment involves an unprofitable branch of a profitable system the Commission's problem becomes * * * complex. Not only is it necessary to scrutinize closely the allocation of revenues and expenses as between the owning or controlling system and the branch line, but it is rendered essential that a balance be struck between the interests of the carrier and those of the industries and communities dependent upon its service, since the ultimate economic losses incident to the abandonment might far outweigh the immediate financial gains of the proprietary system. * * * Recognizing that practically every abandonment affects adversely some interest dependent upon the service, the Commission insists that the controlling convenience and necessity is that of the general public, and that the desire for continued operation must be accompanied by a willingness to support the road through provision of a reasonably adequate flow of traffic. The virtual disappearance of demand not only produces operating losses but negatives the claim of public need. * * * Finally, the Commission is guided by the availability of adequate substitute services. Not only has the denial of applications been influenced by the absence of such substitute services, but even when certificates are issued the Commission frequently imposes conditions designed to provide satisfactory transportation facilities for the areas affected. Conversely, the case for abandonment is materially strengthened when

> alternative services are available, whether over the lines of the applicant carrier or of some other road, or merely by virtue of the existence of adequate highways over which goods can be hauled directly to market or to intermediate transport facilities. Through such processes and such expedience the conflicting claims of carriers and communities are flexibly adjusted in the public interest." (Italics ours.)

From what is expressed in the above decisions and recognized treatise, it is apparent that the principle stated by Chief Justice Hughes in *New York Central S. Corp. v. United States, supra,* where he said that "* * * the term 'public interest' as thus used (i. e., in the Transportation Act of 1920) is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities * * *" is the clearly settled doctrine and, as shown by Mr. Sharfman's discussion, has been consistently so recognized by the Commission.

The War Department, in arguing in behalf of the application before the Commission and the latter in its report dated July 31, 1941, seemingly relied upon the opinions in *Colorado v. United States, supra,* and *Transit Commission v. United States,* 284 U. S. 360, to support the conclusion that the Commission is not limited to a consideration of the interest of the *transportation public* but can consider the so called "superior public interest" affected by a flood control project. The Appellants assert that the two cases cited are not valid authorities to support the Commission's conclusion.

In the former case Mr. Justice Brandeis, speaking for the Court, held that the inherent power of a state to regulate intrastate traffic upon a railroad within its border by

requiring the railroad to operate every part of its line, is subject to the limitation that such operation cannot be required if the result is to burden the interstate operations of the road. The only question of "superior public use" there involved arose in the court's conclusion that, while the Commission must have regard to the needs of both intrastate and interstate commerce, the real objective of the Transportation Act is the regulation of interstate commerce. Hence he held that where the continued operation of an intrastate line would burden interstate commerce, such line must be abandoned. Certainly there is nothing in the opinion to indicate that the "public interest" to be considered is any interest other than that of the transportation public.

Likewise *Transit Commission v. United States*, supra, cannot logically be cited as authority to support the Commission's action in the instant case. There again the question was whether or not, in passing upon an application for the abandonment of a branch line of railroad, the Commission was bound to weigh the benefit to accrue to interstate commerce from the abandonment against the resultant prejudice and injury to intrastate commerce. The Court (Mr. Justice Roberts rendering the opinion on June 4, 1932) held that such benefits and injuries must be weighed and then found that "there is no contradition of the fact that the branch is operating at a serious loss—and that this will continue and increase from year to year and be aggravated by expenditures for the removal of grade crossings." It is manifest from the opinion that the abandonment was there approved because a continuance of the operation of the line in question would have constituted a burden upon interstate commerce.

Counsel for the Appellees in the instant case argued below that the decision in *Woodruff v. United States, et al.*,

40 F. Supp., 949 decided August 29, 1941 by a three-judge-court sitting in the United States Court for the District of Connecticut, is authority (a) to support the Commission's conclusion in the instant case and (b) for the proposition that a shipper injured by an abandonment has no cause of action against the Carrier under the principle of *damnum absque injuria.*

The last mentioned case bears no factual relationship to the one at Bar, as will appear from an analysis of the opinion. Alternate transportation facilities were available to the shippers there affected by the abandonment and a further continuance of operation of the branch line in question would not "earn the bare out of pocket cost of operation and will contribute nothing toward the fixed charges and overhead of the system." Hence the Court held that such line "unless abandoned would constitute a positive drain upon the resources of the system with its interstate ramifications."

With respect to the suggestion that the doctrine *damnum absque injuria* is applicable to the Appellants in the instant case, it is sufficient to say that such doctrine cannot apply when one's property is being irreparably injured or destroyed by an order of an administrative agency entered without statutory authority and in direct contravention of the duty imposed by law upon such agency. Whatever may be the rights of a shipper who suffers financial loss or destruction of property as the result of the abandonment of a line of railroad pursuant to a *lawful* order, certainly it will not be contended that the innocent victim of an *unlawful* order of the Commission cannot be accorded relief in a court of law. Finally, in considering the application here of the decision in *Woodruff v. United States*, *supra*, it should be observed that the Appellant, the Public

Service Commission of Maryland, is specifically empowered by statute to institute proceedings for a judicial review of an order such as the one involved here. Section 1 (20) of Part 1 of the Interstate Commerce Act:

Still another case upon which the Appellees here rely is that of *Railway Labor Executives' Association v. United States*, 38 F. Supp. 818, decided March 6, 1941. There a three-judge-court sitting in the United States Court for the District of Columbia held that the Commission, in approving an application for abandonment, could prescribe conditions relating to treatment to be accorded the carrier's employees. The Commission had refused to entertain an application by certain displaced employees seeking protection, insisting it was without statutory authority to do so. The Court held that the public convenience and necessity which must be served embraced a consideration of the petitioning employees, since the treatment extended such employees could readily have some impact upon the transportation system involved in the proceedings. It is manifest from an examination of the opinion that the Court was merely extending the doctrine applied in *United States v. Lowden, supra*, in relation to mergers to cases relating to abandonment. Here again there was no charge of insufficiency of evidence to support the order. The Commission had refused to receive evidence proffered by the employees concerned and the case was remanded for that purpose. Certainly there is nothing in the opinion that affords the basis for a sound argument that the accepted conception of "public interest" was changed or modified.

Having in mind the fact that, in the instant case, the application for abandonment on its face disclosed that the same was filed "solely at the behest of the War Department" in furtherance of a flood control project and that the line in question was a profitable one serving a neces-

sary public purpose, it is submitted that the Commission was without jurisdiction to entertain the same or issue the certificate of abandonment.

A.

The Commission was without jurisdiction to permit an abandonment upon the grounds stated in the application.

The application filed by the Carrier contained the following answer in response to the question therein as to the reasons why the abandonment should be authorized:

> "The United States Government proposes to construct a flood control dam on the Youghiogheny River about three miles above Confluence, Pa., which will back the water up the stream for about fourteen miles, and will require the abandonment of the Confluence and Oakland Railroad's entire line because it will be submerged for a distance of approximately twelve of its 19.79 miles. The remainder of the line will become a detached segment without rail connection with operator or any other railroad thus rendering it valueless from an operating and traffic standpoint. To relocate the line proposed to be abandoned would cost at least $2,000,000, an expenditure that is not justified from the present and prospective revenue producing standpoint and would constitute an undue burden on interstate commerce without compensating advantage. A copy of the proposed option to the United States of America covering the purchase of the property affected by construction of the Dam is filed herewith and made a part of this application." (See p. 6 of Plaintiffs' Exhibit A).

In the return to questionnaire and the amended return to questionnaire, subsequently filed by the Carrier, it was stated that the community of Friendsville "is almost wholly dependent upon the line for service." (See p. 24 of Plaintiffs' Exhibit A).

The questionnaire also asks the question: "State what effort has been made to dispose of the line so as to insure its continued operation, and what, if any, transportation service will remain or may be substituted for that proposed to be discontinued?" Both returns to the questionnaire responded to this question as follows:

> "A. Applicants are seeking authority to abandon the line at the behest of the United States Government which, in furtherance of its plans for Flood Control, proposes to build a dam near Confluence, Pa., which will submerge about two-thirds of applicants' line between Confluence and Oakland Junction, Pa., and Kendall, Md., rendering the lower end of the line a detached segment without rail connection with operator or other railroads and therefore valueless from a traffic producing standpoint." (See p. 29 of Plaintiffs' Exhibit A).

Both returns also give as a summary statement of the reasons for the application the following explanation:

> "Applicants assume that the United States Government has concluded that the greater public interest and welfare requires the construction of a dam on the Youghiogheny River near Confluence, Pa., and the consequent submerging of a greater part of, and the abandonment of all, of applicants' railroad between Confluence and Oakland Junction, Pa., and Kendall, Md., is superior to any local interest that may be affected. The cost of relocating this line would be too great for the traffic offered and would constitute an undue burden on interstate commerce and therefore would not be in the public interest." (See p. 29 of Plaintiffs' Exhibit A).

It is manifest from the decisions of this Court hereinbefore cited and quoted that such reasons as were alleged by the Carrier in its application and return to questionnaire are not sufficient to invoke the jurisdiction of the

Commission to order an abandonment of the line of railroad. The application plainly asserts that (i) it was filed solely at the behest of the War Department in order to facilitate a flood control project (ii) the Carrier merely *assumed* that the United States Government had concluded that the greater public interest and welfare require the construction of the dam and (iii) the interest served by the project is superior to any local interest that may be affected by the abandonment.

But this is not all. The application clearly shows that the line in question has over a period of years been producing a net profit to the Baltimore & Ohio Railroad (R. p. 24).

It follows that, since the application and returned questionnaire disclosed on their face that the sole reason for the abandonment was the flood control project, the application should have been denied forthwith by the Commission because of lack of jurisdiction to grant an abandonment on such ground.

B.

The Order of the Commission Is Not Based Upon Substantial Evidence.

It has long been the settled law of the land that orders of a regulatory commission of the character here involved must be supported by substantial evidence and that such orders cannot be validly supported by considerations which could not legally influence its judgment.

Minnesota Rate Cases, 230 U. S. 352.
United States v. Abilene & So. Ry., 265 U. S. 274.
Southern Pac. Ry. v. I. C. C., 219 U. S. 433.
Ann Arbor R. Co. v. U. S., 281 U. S. 658.
Ohio Utilities Co. v. Ohio Public Utilities Commission, 267 U. S. 359.
West Ohio Gas Co. v. Ohio Public Utilities Commission, 294 U. S. 64.

The Appellants earnestly submit that there was no substantial evidence to support the order here complained of and that, on the contrary, the only evidence offered in support of the issuance of the certificate was of a nature that (i) clearly established that the line of railroad in question was serving a necessary public purpose and operated at a profit or (ii) related to the alleged superior public interest to be served by the construction of the proposed flood control project. The latter evidence does not form a legal basis for the relief prayed by the Carrier and should not, as a matter of law, have been admitted by the Examiner or considered by the Commission over the objection of the Appellants.

That any order of the Commission, in the exercise of its delegated discretionary power, must be supported by substantial evidence is elementary and references to the following extracts from four of the decisions of this Court are conclusive on this point. In *Baltimore & Ohio Railroad Co. v. United States*, 264 U. S. 258, where the Commission was concerned with an application for the acquisition by one carrier of all of the capital stock of another and a lease of certain terminal properties, Mr. Justice Brandeis, at page 264, said:

> "It is further contended that Paragraph 2 of §5 confers a power purely discretionary, and that, for this reason, the order entered cannot be set aside by a court merely on the ground that the action taken was based on facts erroneously assumed, or of which there was no evidence. The power here challenged is not of that character. Congress by using the phrase 'whenever the Commission is of opinion, after hearing,' prescribed quasi-judicial action. Upon application of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest. It may form this judgment only after hear-

ing. The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action. As it was admitted by the motion that the order was unsupported by evidence, and since such an order is void, there is no occasion to consider the other grounds of invalidity asserted by plaintiffs."

In the earlier case of *Interstate Commerce Commission v. Union Pac. R. Co.*, 222 U. S. 541, the Court, at page 547, said:

"In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700. Its conclusion, of course, is subject to review, but, when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

In *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, the Court, at page 91, in setting aside an order of the Commission said:

"But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in

accordance with the facts proved. A *finding without evidence is arbitrary and baseless.* And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' (Tang Tun v. Edsell, 223 U. S. 681, 56 L. ed. 610, 32 Sup. Ct. Rep. 359; Chin Yow v. United States, 208 U. S. 13, 52 L. ed. 370, 28 Sup. Ct. Rep. 201; Low Wah Suey v. Backus, 225 U. S. 468, 56 L. ed. 1167, 32 Sup. Ct. Rep. 734; Zakonaite v. Wolf, 226 U. S. 272, ante, 218, 33 Sup. Ct. Rep. 31), or if the facts found do not, as a matter of law, support the order made (United States v. Baltimore & O. S. W. R. Co., 226 U. S. 14, ante, 104, 33 Sup. Ct. Rep. 5, Cf. Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 20, 51 L. ed. 942, 27 Sup. Ct. Rep. 585; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 301, 45 L. ed. 201, 21 Sup. Ct. Rep. 115; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Interstate Commerce Commission v. Illinois C. R. Co., 215 U. S. 470, 54 L. ed. 287, 30 Sup. Ct. Rep. 155; Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 288; Muser v. Magone, 155 U. S. 247, 39 L. ed. 137, 15 Sup. Ct. Rep. 77)."

The last quoted opinion was cited very recently by Chief Justice Hughes in *Schechter v. United States*, 295 U. S. 495, 540, wherein, after quoting the same with approval, he said:

> "When the Commission is authorized to issue, for the construction, extension or abandonment of lines, a certificate of 'public convenience and necessity', or to permit the acquisition by one carrier of the control of another, if that is found to be 'in the public interest', we have pointed out that these provisions are not left without standards to guide determination. The authority conferred has direct relation to the standards prescribed for the service of common carriers and *can be exercised only upon findings, based upon evidence, with respect to particular conditions of transportation.* New York Cent. Securities Corp. v. United States, 287 U. S. 12, * * * Chesapeake & O. R. Co. v. United States, 283 U. S. 35." (Italics ours.)

It being manifest from the above enunciated principles, repeated in many other decisions, that a valid order of the Commission must be based upon substantial evidence *"with respect to particular conditions of transportation"*, it is pertinent to summarize briefly the evidence adduced in support of the Carrier's application. That evidence is confined to testimony and exhibits relating to (i) the necessity of the service furnished by the Carrier (ii) the revenues and expenses of the line in question (iii) the purported superior public benefit of the flood control project, and (iv) the cost of relocating the line.

The Necessity for the Service.

In its application for abandonment the Carrier stated that the community of Friendsville is "almost wholly dependent" upon the service by the Carrier.

It is apparent from the Record that the service of the Carrier afforded over the line proposed to be abandoned is

confined to two mixed trains weekly in each direction (R. p. 22). This service constitutes the only rail service available to the shippers and public residing in the community of Friendsville and is likewise the only possible means of transportation whereby the large weekly shipments of McCullough Coal Corporation can be transported (R. pp. 22, 26).

It is equally clear from the admission found in the Report of the Commission that there is no substitute transportation service available to McCullough Coal Corporation, in the event the line is abandoned. It is therein conceded that the coal company could not ship its coal by trucks in competition with other mines having a direct rail service available because the increased cost resulting from such movement and the losses in transit would be excessive (R. p. 26).

Likewise it is uncontradicted in the Record, that McCullough Coal Corporation has been operating its mines for twenty years, has a presently recoverable marketable tonnage in excess of 6,000,000 net tons of coal of an estimated value of $218,000 and that the plant, equipment and properties of the corporation are such that it is prepared to continue in business for many years in the future.

The abandonment of the rail service would clearly bring about the economic destruction of the coal company and, in turn, threaten that of the entire community of Friendsville. It is uncontradicted in the Record that the majority of the inhabitants of the community are dependent for their means of support upon a continuance of the mining operations of McCullough Coal Corporation and, hence, a cessation of such operations would add considerably to the existing public relief rolls in the community.

The Appellant, the Public Service Commission of Maryland, is now and has at all times been a party to these proceedings because it recognizes the disaster that will be visited upon that community if abandonment of the line is permitted.

The Revenues and Expenses of the Line.

It was affirmatively stated by the Carrier, in answers to the questionnaire of the Commission, that the branch line in question had operated at a profit for the calendar year 1939 and it was admitted by the witness A. C. Clarke, Assistant Chief Engineer of the Carrier, that the line has been continuously and is now operating at a substantial profit. Testimony of Mr. Clarke in that respect is found beginning at page 88 of Plaintiffs' Exhibit A and is as follows:

"Q. (By Mr. Miles) Mr. Clarke, in your opinion would this applicant have filed an application to abandon this line had it not been for the desire of the Government to take over the portion of it that they contemplated in connection with the Youghiogheny Dam and Reservoir project? A. Will you read that question?

(Mr. Miles) Read it.

Q. (Question read.) A. I don't think so.

Q. In other words, you do not believe that this applicant would have filed an application to abandon this service for any other reason? A. That is my opinion, my personal opinion, yes.

Q. Now, did I understand, from your direct examination, that you negotiated the sales price or the option price with the Government? A. Yes, sir.

Q. Would you mind stating to us, what was the basis of the price upon which you ultimately agreed? I mean, what were the factors that were considered in arriving at the sum of approximately $306,000? A. It was on a capitalized income basis.

Q. On a capitalized income basis; and what was the basis of the capitalization, what was the accounting formula that you adopted for the purpose of arriving at the capitalized figure? A. We took the revenues or the calculated revenues on the branch for a nine-year period, and we took the actual expenses on the branch for the same period and arrived at a gross earnings on the branch. To the expenses of handling or producing that gross earning, the difference between them being the net, we divided the cost of handling that business on the system to its point of destination or from its point of destination and arrived at the net earnings for the branch, with all expenses deducted for handling the business, excluding taxes, and so forth, and capitalized that to arrive at the price for the line.

Q. I am not sure that I understand your use of the word 'gross' and 'net'. Do I understand that the analysis that you made, which formed the basis of the figure which you capitalized, showed that this branch had net revenues for that period of nine years? A. Yes, sir, it did show that it had that revenue."

Mr. Clarke subsequently, at the request of Examiner Molster, prepared and filed in the Record a detailed statement setting forth the basis adopted by the Carrier and the War Department for the purpose of arriving at the option price. This statement asserts that over the nine year period from 1930 to 1938, inclusive, the average annual net income derived from the operation of the line in question was $19,798. It is significant, however, to observe that the last mentioned figure results from the application to the gross income (i. e. revenues less expenses) of an operating ratio of 50.0, whereas Mr. Clarke in the same statement, further asserts (p. 466 Plaintiffs' Exhibit A) that:

"It was my conclusion that a fair operating ratio to apply * * * would be about 40.0 and that it might reasonably be placed as low as 37.5."

Mr. Clarke, however, acquiesced, by way of compromise, in the application of the ratio of 50.0 in fixing the option price. On the other hand, Mr. Rodenbaugh, a railway executive of long and successful experience and a witness for the Appellants, insisted that the proper operating ratio to be applied was 25.0. The application of either the last mentioned ratio or that urged by Mr. Clarke (40.0 or 37.5) would result in a higher annual net income than was finally used as the basis for the option price. The inescapable and paramount point of the discussion, however, is that Mr. Clarke, the War Department and Mr. Rodenbaugh all agreed that the Carrier operated at a profit and the only question in dispute was as to the amount of that profit.

Thus, in the light of (i) the answers of the Carrier to the questionnaires of the Commission (ii) the testimony of Mr. Clarke (iii) the subsequent detailed written statement of Mr. Clarke (iv) the testimony of Mr. Rodenbaugh and (v) the admission of the representatives of the War Department, it is indisputable, nor is it contended otherwise, that the Commission was here concerned not with the application of a carrier seeking to be relieved from a burden upon interstate commerce but with one seeking to abandon an admittedly profitable operation serving an essential public purpose, solely in furtherance of the construction of a flood control project.

The Purported Superior Public Benefit of the Flood Control Project.

The Appellants further earnestly urge that, in the light of the record and the numerous authorities above cited, the only *relevant* evidence before the Commission was that which related to whether the continued operation of the line in question is necessary in the interest of the transportation public. Appellants further assert that any and all evidence in the record which related to the alleged

public benefit to be served by the construction of the flood control project is irrelevant and could not form a lawful basis for the granting of the certificate issued to the Carrier. Appellants, therefore, see no purpose to be served by discussion herein of the purported merits of that project other than to comment that there is no evidence its construction will serve any purpose with respect to the needs of the transportation public involved. To the contrary it will destroy an existing service which is admittedly both profitable and essential.

Indeed, the Appellants are unable to find any authority in the reported cases that constitutes a precedent for the Commission's action here. It is true that in *United States Feldspar Corporation v. United States*, 38 Fed. (2d) 91 (1930), the Commission was concerned with an application for abandonment which apparently had been influenced by a proposed flood control project. But it is manifest from an analysis of the opinion there that the evidence before the Commission established that (a) there were adequate motor truck lines available as a substitute transportation service, (b) the railroad line in question had been "gradually dying economically" and (c) the continuation of the service would have been burdensome to the carrier. In addition to such evidence, to which the court specifically referred in its opinion, it is further apparent therefrom that the line in question had actually been condemned in appropriate proceedings instituted by an agency of the State of New York. It should be observed that in the condemnation proceedings, damages had been awarded in an amount sufficient to defray the cost of relocating the line, in the event that the Commission determined that the public necessity and convenience required the continuance of its operation. It is nowhere suggested in the opinion that the particular line was profitable, served the public

necessity and convenience or constituted the sole available means of transportation to the shippers served by it. Hence an examination of the opinion in the last mentioned case, in relation to the facts there presented, is persuasive of the conclusion that it affords no precedent for the relief sought by the Carrier in the instant case. To the contrary, it is authority for the position of the Plaintiffs here adopted —that the criterion by which applications for abandonment must be determined is the necessity and convenience of the transportation public concerned.

It should be noted that the District Court in the case at bar did not pass upon the competency of the evidence before the Commission dealing with the purported superior public use involved in the flood control project. Neither did the District Court question the evidence before the Commission as to the necessity for the railroad service nor as to the profitable operation of the line. In this respect, the District Court said (R. p. 48):

> "It is not necessary in this case to decide in which of the Commission's opinions (i. e., the majority or the minority*) the extent of its authority is more correctly defined. It is true that Congress has given the power to other agencies to decide whether a flood control project that will interfere with the operation of a railroad shall be built; and that in a number of decisions the Supreme Court has held that the criterion to be applied by the Commission in the exercise of its authority is not the general public welfare, but 'The adequacy of transportation service in its essential conditions of economy and efficiency, and to the appropriate provision and best use of transportation facilities.' New York Central Securities Co. v. United States, 287 U. S. 12, 24; see also Colorado v. United States, 271 U. S. 153; Texas v. United States, 292 U. S. 522; United States v. Lowden, 308 U. S. 225."

* Explanation ours.

The refusal of the District Court to consider the paramount issue as to the jurisdiction of the Commission to order an abandonment because of a flood control project where the line is shown to be a necessary one operating at a profit, is all the more remarkable in view of the fact that the three reports or decisions prior to the opinion of the District Court (i. e. the reports of the Examiner, the majority and the minority of the Commission) had all been primarily concerned with this issue.

Obviously the primary issue in the case is whether, under the Interstate Commerce Act, Section 1 (18), the jurisdiction of the Commission is confined to the public interest as it relates to transportation or permits the Commissioner to go beyond such limits and pass upon the purported general public interest involved in the Flood Control Act. Under the many decisions of this Court, hereinbefore cited and discussed, the Appellants submit that the jurisdiction of the Commission is limited to a determination of the public interest as it relates to transportation. As Chairman Eastman said:

> "This Commission has no authority to go outside the field of transportation and pass judgment upon the question whether lines of railroad which are not an undue burden upon interstate commerce should be abandoned because a superior public interest demands that they make way for a public improvement such as the flood control program here involved."

II.

The Commission's Findings with Respect to the Question of Relocation Were Contrary to Law.

It is hence asserted that, in the light of what has been heretofore argued and the authorities cited in support of the same, the Commission could not validly pass upon the question of relocation since it was without authority to authorize the abandonment of the existing line.

Assuming, however, that the Commission acted within its power in considering and acting upon the question of relocation, it is further submitted that its findings with respect thereto were contrary to law and that its order should hence be set aside.

In the Report of the Commission, it adopted the findings and conclusions of Division 4, among which were the following:

> "Whether a substitute line should be provided, *regardless of whether the cost of relocating is paid by the applicants or by the War Department*, is doubtful in the light of the traffic handled during the past 6 years and what may be handled in the future. Even at the low operating cost urged by the coal company the net system profits annually since 1934 would not have been sufficient to *produce a reasonable return upon an investment as low as $800,000*. The inclusion of the estimated increase in maintenance costs would diminish the rate of return still more. We are of the opinion that the same consideration must be given to the proposed expenditure of public funds for relocating the line that would be given if the railroad were to bear the expense. If public funds are to be used to protect the coal company from loss caused as a result of the national flood-control program this should be done directly and not by means of uneconomic expenditures in railroad construction and maintenance." (p. 478 of Plaintiffs' Exhibit A). (Italics ours.)

A.

The Commission Erred in Its Finding That the Carrier Would Be Entitled to Earn a Return Upon the Investment in the Cost of Relocation, Regardless of the Source of the Funds Defraying Such Cost.

The last quoted conclusion of the Commission constitutes a finding that the Carrier should be entitled to earn a reasonable return upon the amount expended to relocate

the line, even if such amount was paid from public funds. That is to say, assuming that the Secretary of War should conclude to defray the cost of relocating the line as a part of the cost of the flood-control project, and hence such line would be constructed with donated capital, the Commission holds that the Carrier would be entitled to a return thereon. This, it is respectfully submitted, is contrary to the trend of the authorities.

A carrier or other public utility is entitled to earn a fair return upon the fair value of its property devoted to the public service. Where possession of such property results from a public grant, however, it should not be included as a part of the utility's rate base, although the costs of maintaining and operating service by means of such property constitute expenses which must be considered in a determination of the allowable income to which such carrier or utility is entitled.

This Court has apparently not passed directly upon the question but the overwhelming weight of authority supports the contention that a utility is *not* entitled to claim a return on contributed or donated capital. Thus, regulatory bodies of the following jurisdictions have held that donated property is not properly included in the rate base of a utility and that a utility is not permitted to earn a return thereon: Pennsylvania, Wisconsin, Michigan, New York, Ohio, Virginia, Washington, West Virginia, California, Illinois, Indiana, Missouri, Nevada, New Jersey, North Dakota, Rhode Island and Utah.

See also *Wisconsin Hydro Electric Company v. Railroad Commission*, 208 Wis. 348; *Sutter Butte Canal Co. v. Railroad Commission*, 202 Calif. 179; *Public Utility Commission v. East Providence Water Company*, 48 R. I. 376.

In the instant case, however, the Commission has apparently decided, *as a matter of law*, that a relocation of the line in question cannot be required unless the Carrier would earn a return thereon regardless of the source of the funds from which the cost of relocation would be defrayed. Such a conclusion, it is earnestly urged, not only is repugnant to the law of fair value and return thereon but ignores the expressed intention of Congress as contained in legislation dealing with the subject of flood control.

Reference to the Flood Control Act, as approved on June 22, 1936 and amended June 28, 1938, clearly indicates that it was the intent of the Congress to provide that the War Department should relocate existing public utilities and highways where flooding of the same was necessitated by the construction of such a project. The pertinent provisions of the congressional enactment, 53 Stat., 1415 (33 U. S. C. A. 701c—1), read as follows:

> "In case of any dam and reservoir project, or channel improvement or channel rectification project for flood control, herein authorized or heretofore authorized by the Act of June 22, 1936, as amended, and by the Act of May 15, 1928, as amended by the Act of June 15, 1936, as amended, title to all lands, easements, and rights-of-way for such project shall be acquired by the United States or by States, political subdivisions thereof or other responsible local agencies and conveyed to the United States, and provisions (a), (b), and (c) of section 701c of this title shall not apply thereto. Notwithstanding any restrictions, limitations, or requirement of prior consent provided by any other Act, the Secretary of War *is hereby authorized and directed to acquire in the name of the United States title to all lands, easements, and rights-of-way necessary for any dam and reservoir project or channel improvement or channel rectification project for flood control,* with funds heretofore or hereafter appropriated or made available for such projects, and States,

political subdivisions thereof, or other responsible local agencies, shall be granted and reimbursed, from such funds, sums equivalent to actual expenditures deemed reasonable by the Secretary of War and the Chief of Engineers and made by them in acquiring lands, easements, and rights-of-way for any dam and reservoir, project, or any channel improvement or channel rectification project for flood control heretofore or herein authorized: *Provided*, That no reimbursement shall be made for any indirect or speculative damages: *Provided further, That lands, easements and rights-of-way shall include* lands on which dams, reservoirs, channel improvements, and channel rectifications are located; *lands or flowage rights in reservoirs and highway, railway, and utility relocation.* * * * (Italics ours.)

It is earnestly urged that the above language provides the means for relocating the line of the Carrier, in the event that abandonment of its line is necessitated in order to facilitate construction of the flood control project in question. The Congress has provided a procedure to be followed where the Secretary of War finds it necessary to acquire a railroad performing an essential transportation service and that is through the medium of purchase or condemnation, with an allowance to be made for the necessary cost of relocation. That procedure, if followed here, would have obviated the present proceedings which are, in essence, an effort to bring about the abandonment of an admittedly essential railroad without making any provision for its relocation.

It may be argued that the power vested in the Secretary of War by the Flood Control Act to relocate an existing *necessary* railroad is permissive and not mandatory. But, in either event, it would appear inescapable that the Commission could not properly pass upon the question of relocation until there had been a determination as to

who would defray the expense thereof. Clearly if such cost is to be borne by the Government, the proceeds advanced constitute donated capital upon which the Carrier would not be entitled to earn a return.

B.

The Commission Erred in Holding That the Carrier Would Be Entitled to Earn a Return Upon an Investment by It in the Cost of Relocation.

Assuming, however, that the Carrier was required to relocate the line with *its own funds*, it is submitted that it would not necessarily be allowed to earn a return on such investment.

It must be borne in mind that the line in question is a branch of a large and, so far as the record in the instant case discloses, a profitable system. The true test then is whether the line is presently or likely to become in the future a burden upon the system, and the Commission has answered that inquiry in the following language:

> "There is no evidence that the line involved herein has heretofore been a burden on the system or that the volume of traffic last reported would not continue to support it in the future if it remained undisturbed." (R. p. 28.)

The principle that the entire revenues of a given system must be taken into account and not merely the direct return from the branch line itself, is supported by the overwhelming weight of authority.

In *Colorado v. United States, supra*, this Court, speaking through Mr. Justice Brandeis, held that the Commission may authorize a carrier to cease the operation of a branch, if the losses resulting from such operations would burden the interstate operations of the road. The Court (271 U. S.

153 at 160, 162, and 163) in referring to the action of the Commission therein, said:

> "The certificate was granted on the ground that the local conditions are such that public convenience and necessity do not require continued operation; that for years operation of the branch had resulted in large deficits; that future operation would likewise result in large deficits; that the operating results of the branch are reflected in the company's accounts; that it would have to make good the deficits incurred in operating the branch; and that thus continued operation would constitute an undue burden upon interstate commerce. Re Abandonment of Branch Line by Colorado & S. R. Co., 72 Inters. Com. Rep. 315, 82 Inters. Com. Rep. 310; 86 Inters. Com. Rep. 393. * * * *The certificate issues not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discriminations.* The Commission by its order removes an obstruction which would otherwise prevent the railroad from performing its Federal duty." (Italics ours.)

It is patent from an examination of the above decision that the test for abandonment purposes is not whether the carrier is earning a return on its investment in the branch line but whether to require its continuance in service would be prejudicial to the interests of the system of which it is a part and, hence, a burden upon interstate commerce.

In *Transit Commission v. U. S.*, 284 U. S. 360 at 369, this Court in reviewing a decision of the Commission authorizing an abandonment and speaking through Mr. Justice Roberts said:

> There is no contradiction of the fact that the branch is operating at a serious loss, as shown by the carrier's accounts offered in evidence, and that this will continue and increase from year to year and be aggravated by expenditures for the removal of grade crossings." * * *

and after reconciling the decision with that in *Colorado v. U. S.*, supra, further said:

> "The Court there held that in the issuance of a certificate of public convenience and necessity the Commission need not determine with mathematical exactness the extent of the burden imposed upon interstate commerce by the operation of a branch line; that such burden might involve various elements, and that if upon the whole proof the conclusion was warranted that continued operation would in fact unreasonably burden the interstate commerce of the carrier, the Commission was justified in authorizing abandonment."

It is appropriate to parenthetically observe at this point that the Commission, in the case at bar, has authorized the abandonment without *any* evidence as to the operating results of the system as a whole and prior to *any* determination as to whether the funds required to defray the cost of relocation will be those of the Carrier's or derived from some other source.

In *Fort Smith Light & Traction Co. v. Borland*, 267 U. S. 330, 332, Mr. Justice Brandeis again said:

> "The fact that the company must make a large expenditure in relaying its tracks does not render the order void. Nor does the expected deficit from operation affect its validity. A railway may be compelled to continue the service of a branch or part of a line, although the operation involves a loss. *Missouri P. R. Co. v. Kansas ex rel. Taylor*, 216 U. S. 262, 279, 54 L. ed 472, 479, 30 Sup. Ct. Rep. 330; *Chesapeake & Ohio Railroad Co. v. Public Service Commission*, 242 U. S. 603, 607, 61 L. ed. 520, 532, 37 Sup. Ct. Rep. 234." (Italics ours.)

In *Chesapeake & Ohio Railroad Co. v. Public Service Commission*, 242 U. S. 603, 607, this Court held:

> "'One of the duties of a railroad company doing business as a common carrier is that of providing rea-

sonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the state, and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss. * * * That there will be such a loss is, of course, a circumstance to be considered in passing upon the reasonableness of the order, *but it is not the only one.* The nature and extent of the carrier's business, its productiveness, the character of service required, the public need for it, and its effect upon the service already being rendered, are also to be considered.'" (Italics ours.)

In *State v. Georgia Southern & Florida Railway Co.*, 190 So. 527, the Supreme Court of Florida, citing numerous decisions of this Court, held:

"However, it is clear that the duty to furnish reasonably adequate train service to local communities served by such carrier, is essentially among the imperative duties that are by law imposed upon railroad common carriers in consideration of the privileges conferred upon them by the State for the benefit of the public. But the asserted requirements for adequate train service are subject to judicial determination, and must be reasonable for the public needs and not so unduly burdensome to the carrier as to operate as an unlawful deprivation of property without due process of law or as an unlawful taking of property for public purposes without just compensation. Each case should be determined by a fair consideration of all the pertinent facts affecting the rights of the public, the duty of the carrier with the burden to the carrier and the reasonable needs of the public. In particular cases *the cost of the service may exceed the receipts therefrom, but this may not control if it does not unduly affect the receipts from the entire railroad system* of the company, or impair organic rights or directly and

unreasonably burden or impede interstate or foreign commerce. See *Chesapeake & Ohio R. Co. v. Public Service Comm.*, 242 U. S. 603, 37 S. Ct. 234, 61 L. ed. 520; 51 *C. J.* 969-972; *Atlantic Coast Line R. Co. v. North Carolina Corp. Comm.*, 206 U. S. 1, 27 S. Ct. 585, 51 L. ed. 933, 11 Ann. Cas. 398; *Missouri Pac. R. Co. v. Kansas*, 216 U. S. 262, 30 S. Ct. 330, 54 L. ed. 472; *State of Washington ex rel. Oregon R. & N. Co. v. Fairchild*, 224 U. S. 510, 32 S. Ct. 535, 56 L. ed. 863; *Chicago, B. & Q. R. Co. v. Railroad Comm. of Wisconsin*, 237 U. S. 220, 35 S. Ct. 560, 59 L. ed. 926." (Italics ours.)

Also, in *Chicago, B. & Q. Railroad Co. v. Oglesby*, 198 Fed. 153, 157, the court said:

"It is also true that the *mere fact* that the income from the expenditure at a particular point upon a railroad may not earn a fair return upon the capital invested at that point *is not conclusive* in determining the reasonableness of an order of a railroad commission requiring such an improvement." (Italics ours.)

The Illinois Commerce Commission in the decision of *In re Wheelock*, 6 Ill. C. C. R. 181, held as follows:

"'The law is well settled, not only by the supreme court of the state of Illinois but by the Supreme Court of the United States, that while a public utility cannot be made to continue operating as such where its operations fail to yield a fair return, no public utility will be permitted to abandon a part or portion of its utility business merely because such a part or portion can only be continued to be operated at a loss. The right to cease doing business because unprofitable extends only to the utility as a whole, and does not embrace the right of cessation as to a part only unless the continued operation of that part or portion so depletes the revenues of the company as to render the operation of the whole confiscatory. *People ex rel. Cantrell v. St. Louis, A. & T. R. R. Co.* (1898) 176 Ill. 512, 529, 530, 52 N. E. 292; *Chicago Union Traction Co. v. Chicago* (1902) 199 Ill. 679, 647, 65 N. E. 470; *Northern*

Illinois Light & Traction Co. v. Commerce Commission ex rel. Ottaws, 302 Ill. 11, P. U. R. 1922E, 690, 134 N. E. 142; *Missouri P. R. Co. v. Kansas ex rel. Taylor* (1910) 216 U. S. 262, 54 L. ed. 472, 479, 30 S. Ct. 330; *Ft. Smith Light & Traction Co. v. Bourland*, 267 U. S. 330, 69 L. ed. 631, 633, P. U. R. 1925C, 604, 45 S. Ct. 249.'" (Italics ours.)

See also annotation of authorities to same effect in 123 A. L. R. 922.

In the instant case there is not a scintilla of evidence to suggest that the Carrier would operate at a loss over any one of the three proposed relocated routes. To the contrary, the evidence is that the Carrier's revenues would be more than sufficient to defray its expense of operating and maintaining such a relocated line. Reference to the findings of the Commission (R. p. 24) discloses that the net system profits from the traffic of the line in question, assuming that the system cost of handling traffic originating on or destined to points on the line amounted to 50% of the revenues therefrom, would have been $23,079 for the calendar year 1939. Using a 25% operating factor, urged by the Appellants to be more representative of the actual cost of handling line traffic over the system, such profit would have been $39,463 (R. p. 24).

Even assuming a normal increase in the cost of operating and maintaining a relocated line over that of the existing line in the sum of $8,000 annually, as contended by the Carrier (R. pp. 25-26), it arithmetically follows that the Carrier would have operated at a profit for the year 1939, no matter which of the two suggested operating factors is adopted.

Furthermore, the Commission found that the Carrier's system profit has been increasing annually for the past five years and, in the light of the present National Defense

Program and the great demand for coal resulting therefrom, it seems patent that its revenues derived from the line in question will continue to increase for a considerable period of time in the future.

It is submitted, therefore, that the evidence is uncontradicted that the Carrier is earning a sufficient amount from the line in question to defray the cost of operating and maintaining a relocated line along any of the three proposed routes. It follows that, in the absence of any evidence that such an operation would constitute a burden upon the system, or would in anywise prejudicially affect interstate commerce, a relocation is required, *if the present line is to be abandoned.*

CONCLUSION.

An examination and consideration of the Report of the Commission discloses manifest errors of law.

1. The jurisdiction of the Commission, under the statute pursuant to which it acted, is limited to measuring the application for abandonment by the interest of the transportation public. The test of jurisdiction was clearly expressed by Chairman Eastman in the following language appearing in his dissenting opinion:

> "In the second place, our authority under Section 1 (18) is to determine whether lines of railroad should or should not be abandoned from the standpoint of the public interest as it relates to transportation. The power plainly was given us for the purpose of protecting the public against abandonments which cannot be justified from that standpoint, and at the same time to lend specific governmental sanction to the abandonment of lines which are shown to be an undue burden upon Interstate Commerce. * * * This Commission has no authority to go outside the field of transportation and pass judgment upon the question whether lines of railroad which are not an undue burden upon

interstate commerce should be abandoned because a superior public interest demands that they make way for a public improvement such as the flood-control program here involved. Other statutes which we do not administer provide for a determination of that question in an orderly manner and in accordance with the rules which relate to such determinations." (R. pp. 36-37).

In the instant case, however, the Commission has completely ignored the yardstick by which it is required to measure applications for abandonment and has granted the certificate despite its conclusion that:

> "There is no evidence that the line involved herein has heretofore been a burden on the system or that the volume of traffic last reported would not continue to transport it in the future if it remained undisturbed." (R. p. 34).

2. The Commission was without authority to pass upon the question of relocation until there had been a determination of whether the Secretary of War or the Carrier would defray the cost thereof and a *subsequent* finding, after hearing, with respect to numerous other relevant facts, such as (i) the true cost of relocation* (ii) the probable revenues to be derived by the Carrier from operations over the relocated line**, (iii) the probable expenses to be incurred by the Carrier from operations over the relocated line (iv) the revenues and expenses of the system as an entirety** and (v) the over-all effect of the relocation upon the transportation public.**

The Commission has disposed of the entire question by holding that the relocation should not be required because the Carrier would not earn a return on the cost of reloca-

* The Commission found that it was "not convinced of the accuracy of any of the estimates" of the cost of relocation (R. p. 25).

** There was *no evidence* with respect thereto.

tion, regardless of who pays for the same. Such a determination, it is submitted, is unlawful.

The Appellants submit, therefore, that the order of the Statutory Court dismissing their bill of complaint should be reversed and that a permanent injunction should be granted restraining and enjoining the abandonment of the railroad service by the Carrier under the certificate issued.

Respectfully submitted,

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